

Benchmark Mechanical Contractors, Inc. and Plumbers and Pipefitters Local Union No. 189, AFL-CIO, Petitioner. Case 9-RC-17037

March 11, 1999

DECISION AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and an objection to an election held March 5, 1998,¹ and the Regional Director's report recommending disposition of them.² The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 1 for and 1 against the Petitioner, with 3 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the Regional Director's findings and recommendations.³

The Regional Director found, *inter alia*, that employee Jack Emmons was not a statutory supervisor, and accordingly recommended that the challenge to his ballot be overruled. We agree.

Emmons was hired as a welder in August 1997, and was promoted to a nonsupervisory foreman position in October 1997. On about February 24, Superintendent Tracy McCray approached Emmons about a general foreman position on a job in Hazard, Kentucky, from March 9 through April 3. McCray told Emmons that, as the general foreman on that job, he could get a \$1-per-hour raise.⁴ Emmons agreed to take this position. On March 3, McCray informed Emmons that he would not be allowed to vote in the election because he had been selected as the general foreman on the Hazard job. Emmons continued performing unit work until the March 5 election, however, and voted subject to challenge. Later that day Emmons quit his employment. Upon receiving his last paycheck on March 12, Emmons discovered that he had been given a \$1 raise effective March 2.

Although finding that the general foreman's position entailed supervisory authority,⁵ the Regional Director recommended overruling the challenge to Emmons' bal-

lot. The Regional Director found that Emmons was a unit employee from August 1997 through at least March 2,⁶ and that the general foreman position on the Hazard job would have lasted for a period of less than a month. Further, the Regional Director noted that the Employer, through McCray, admitted that Emmons most likely would have returned to his unit position thereafter.⁷ Accordingly, the Regional Director found that such limited service as a supervisor was insufficient to warrant exclusion from the bargaining unit.

Assuming without finding that the general foreman's position involved the exercise of supervisory authority, we find, in agreement with the Regional Director, that this assignment to Emmons, limited to the Hazard project, does not warrant his exclusion from the bargaining unit.⁸

As the party seeking to exclude an individual from the unit, the Employer has the burden of proof on the issue of Emmons' supervisory status. *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992); *Pacific Dry Dock Co.*, 303 NLRB 569 (1991). Where the employee at issue is engaged part of the time in a supervisory position and the rest of the time as a nonsupervisory unit employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his working time in a supervisory position or whether such work is merely sporadic and insignificant. See, e.g., *Gaines Electric Co.*, *supra*,⁹ *Canonie Transportation Co.*, 289 NLRB 299, 300 (1988).

Applying this standard, we find the evidence fails to establish that Emmons would have spent a regular and substantial portion of his time as a supervisor, even if he had not quit on the day of the election. As noted above, Emmons worked as a unit employee from the time of his hire in August 1997, until at least March 2. The record establishes that he would have worked in the general

⁶ The Regional Director found that the evidence was not clear as to whether Emmons in fact possessed or exercised supervisory authority at the time of the election. Although the Employer asserts that Emmons became a supervisor on March 2, the Regional Director's investigation showed that during the week of March 2, Emmons performed almost exclusively the same unit work he had always performed, i.e., gluing and/or welding pipe with another employee; and no evidence to the contrary has been proffered.

⁷ McCray added that if Emmons had performed well as general foreman, he may have been offered a general foreman position at another location if one became available at the time. The Employer's records indicate, however, that only rarely does it have a general foreman on the jobs where the unit employees are working.

⁸ We agree with the Regional Director that the evidence is not clear as to whether Emmons possessed or exercised supervisory authority at the time of the election. We find it unnecessary, however, to resolve this issue in view of our finding that the assignment does not establish supervisory authority in any event.

⁹ We find unpersuasive our dissenting colleague's contention that the principles set forth in *Gaines Electric* are inapplicable because Emmons' had been appointed to the supervisory position as of the day of the election. A showing that the appointment became effective as of the date of the election cannot compensate for the failure to show that the appointment is more than one of limited duration.

¹ All dates are in 1998 unless stated otherwise.

² The Regional Director did not consider the Petitioner's objections, as they are being held in abeyance pending completion of the investigation in Case 9-CA-35780.

³ In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to sustain the ballot of Paul Zickafoose.

⁴ According to McCray, he offered, and Emmons accepted, the general foreman position on February 24. According to Emmons, McCray told him that there was a chance Emmons could be the general foreman on the job and get a \$1 raise, but that he would have to speak to the owner about it first.

⁵ The Regional Director relied on the statement of Sam Malone, who was subsequently hired as the general foreman on the Hazard job. Malone stated that he was responsible for ensuring that the work got done and that it was his understanding that he could hire, fire and discipline employees, and could give employees time off and adjust work schedules, but did not actually exercise such authority on the job.

foreman position through the completion of the Hazard project on April 3, but not beyond that. Significantly, by the Employer's admission, it was anticipated that Emmons would return to his unit position thereafter. In these circumstances, where the supervisory position is of such limited duration, where Emmons had not previously acted with supervisory authority, and where there is no showing of any likelihood to serve as a supervisor in the future (even had he not quit his employment), we find that the general foreman assignment is insufficient to extinguish Emmons' community of interest with other employees. *OHD Service Corp.*, 313 NLRB 901 (1994); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

In finding that Emmons' assignment as general foreman is sufficient to establish supervisory status, our dissenting colleague contends that the supervisory assignment must be presumed to be permanent, even though the actual assignment was one of limited duration. He implies that the Union has the burden here of showing that there were temporal limits on Emmons' status, and that the Union has failed to meet its burden here. Our colleague's contention ignores both the law and the facts. First, it is well established that the burden of proof is on the party alleging supervisory status. See e.g., *General Security Services Corp.*, 326 NLRB 312 (1998). That burden is not met by coming forth with evidence of a supervisory assignment of limited duration. Indeed, as noted above, it is not disputed that the general foreman position on the Hazard site was scheduled to end on April 3. Second, in view of the Employer's admission that Emmons would likely return to his unit position after the Hazard job ended, there is simply no basis for our colleague to presume that Emmons' supervisory status is not temporary.

In sum, we find the evidence fails to establish that Jack Emmons is a statutory supervisor. Accordingly, we shall direct the Regional Director to open and count his ballot.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Jack Emmons. The Regional Director shall then serve on the parties a revised tally of ballots and take further appropriate action. In the event the

Petitioner receives a majority of votes cast, a certification of representative shall issue.

MEMBER HURTGEN, dissenting in part.

The Employer challenged the ballot of Jack Emmons on the ground that he was a supervisor at the time of the March 5, 1998 election.¹ I agree.

Emmons previously worked as a nonsupervisory foreman for the Employer. On February 24, he was offered,

and accepted, a position as general foreman. His first job would begin on March 9. On February 27, Emmons and Employer Superintendent McCray visited the jobsite (Hazard) where Emmons was to be the general foreman. They looked over the job, determined what materials would be needed, and discussed how many employees and what hours of work would be necessary for the job. In addition, Emmons was asked to recommend welders for the job.

Effective March 2, Emmons title was changed to general foreman, and his pay was increased at that time by \$1 an hour. On March 3, he was told that, since he was general foreman, he would not be allowed to vote in the upcoming election.

On March 5, Emmons nonetheless sought to vote in the election, and his ballot was challenged by the Employer. On that same day, but after the election, Emmons changed his mind about becoming a general foreman, and he quit his employment with the Employer.

Following Emmons' resignation, Sam Malone became the general foreman on the job which was to have been supervised by Emmons. Based on the duties carried out by Malone, the Regional Director found that the general foreman's job was a supervisory position. This finding is not contested. He further found, however, that Emmons was not a supervisor, and overruled the challenge to his ballot. The Regional Director found that, even if Emmons had become a supervisor on March 2, his service as a supervisor would have been for less than a month, at which time he "would have most probably" returned to a job in the unit. The Regional Director found that such temporary service as a supervisor was not sufficient to exclude him from the unit. I disagree.

As discussed above, Emmons became a supervisor on March 2. His title was changed on that day and his supervisory pay began on that day. And, significantly, his supervisory authority began on that day.

This status of supervisor continued to exist at the time of the election. The fact that Emmons terminated his relationship with the Employer after the election is irrelevant. Indeed, my colleagues do not rely upon this termination. Rather, they argue that, even absent the termination, Emmons would cease to be a supervisor as of April 3 (the scheduled end of the Hazard job). They thus regard Emmons as only a temporary supervisor as of the date of the election.

My colleagues do not quarrel with the proposition that Emmons was a supervisor on the Hazard job. However, as noted, they assert that his supervisory position was one of limited duration, i.e., it would definitely come to an end at the conclusion of the Hazard job on April 3. The record does not support such a definitive conclusion. Indeed, it is contradicted in the majority opinion itself. That is, the majority acknowledges that *it was uncertain*

¹ All dates are in 1998 unless indicated.

as to what would happen to Emmons after the Hazard job ended.²

I agree that the burden of proof is on the party who seeks to show supervisory status. However, in my view, once supervisory status is shown to exist, that status is presumed to continue until the contrary is shown.³ In the instant case, there was only a showing that the supervisory status might come to an end at the conclusion of the Hazard job.

² See, for example, fn. 7, *supra*, and accompanying text.

³ This position is consistent with the general rules of law (and physics) that once a state of affairs is shown to exist, it is presumed to continue until the contrary is shown.

In sum, Emmons was a supervisor on the day of the election, and he was scheduled to remain a supervisor for *at least* another month. There is no showing that he thereafter would revert to employee status.⁴

⁴ My colleagues rely on *Gaines Electric*, 309 NLRB 1077 (1992). The case does not aid them. Under *Gaines*, “the fact that [a person] may have engaged in Section 2(11) duties on the date of the election” does not make the person ineligible. I agree. Obviously, the mere fact that an employee performs a 2(11) action on election day does not transform the employee into a supervisor. But where, as here, a person is appointed to, and holds, a supervisory position on the day of the election, that is sufficient to render the person ineligible to vote.